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JABATAN KERJA RAYA MALAYSIA & ANOR v. SUNISSA SDN BHD

COURT OF APPEAL, PUTRAJAYA
KAMALUDIN MD SAID JCA
RAVINTHRAN PARAMAGURU JCA
B HASHIM HAMZAH JCA
[CIVIL APPEAL NO: W-01(C)(W)-584-10-2019]
26 MAY 2022

C **Abstract** – *(i) When a clause in a contract is a condition precedent, based on mandatory language which is unambiguous, it must be complied with unless there is evidence of a waiver on the part of the other party; (ii) The fact that an aggrieved contractor filed a series of appeals against the rejection of its claim for loss and expenses could not detract from the finality of the certificate of final accounts. The certificate did not* D *lose its legal effect as a document that conclusively settled accounts between parties after the completion of a project.*

CONTRACT: *Construction contract – Clauses – Employer and contractor entered into contract to construct building – Delay in project not caused by contractor's fault* E *or neglect – Contractor claimed for loss and expense – Failure of contractor to give written notice with estimate of loss to Superintending Officer within 30 days of occurrence of event as stated in cl. 44(1) of contract – Whether clause a condition precedent ought to be complied with – Whether contractor could claim for loss and expense after signing certificate of final accounts*

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This appeal arose from the partially successful claim of a contractor in the High Court for loss and expense against the Government. The appellants, the Government of Malaysia and the Jabatan Kerja Raya (Public Works Department) ('employer') appointed the respondent ('contractor') to construct a new ten-storey High Court building in Kuantan. The project was G completed successfully. However, the construction was beset with delays. A total of four certificates of delay and extensions of time ('EOTs') were granted to the contractor. The delay in the project was not caused by the contractor's fault or neglect. Despite the delays, however, the project was successfully completed and a certificate of practical completion was issued H on 17 July 2012. The EOTs were approved under cl. 43.1(b), (c), (e) and (i) of contract by the Superintending Officer ('SO'). Under cl. 44.1, the contractor was entitled to claim for loss and expense for the delay if the EOTs were approved under cl. 43.1(c), (d), (e), (f) and (i). The contractor claimed in the High Court for loss and expense against the employer, I amounting to RM11,937,057.33. The employer's defence to the claim for loss by the contractor was the failure to give written notice with an estimate

of loss to the SO within 30 days of occurrence of any particular event stated in cl. 44.1. It was not disputed that the contractor did not give the said notice within 30 days of the occurrence of the event in question. The notice was given only after the issuance of each of the four separate EOTs. However, the contractor complied with cl. 44.2 which was the second condition precedent. The said clause required full particulars of all claims for direct loss or expense under cl. 44.1 to be submitted within 90 days of the certificate of practical completion. The failure of the contractor to comply with cl. 44.1 was the reason that the claim for loss and expense was denied by the employer. The High Court Judge ('HCJ') granted judgment in the sum of RM2,988,480.81, which he said were loss and expense 'within' reasonable contemplation and therefore were not caught by the notice period in cl. 44.1. The balance of the claim of the contractor was not allowed as they represented loss and expense 'beyond' reasonable contemplation and for which notice in cl. 44.1 was a condition precedent. The issues that arose were (i) the effect of the failure to comply with the 30 days' time period in cl. 44.1; and (ii) whether the contractor could claim for 'loss and expense' after signing the certificate of final accounts.

Held (allowing appeal; setting aside judgment of High Court)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) Whether a term is an essential condition precedent is very much dependent on the language and its relation to the contract. Clause 44.1 is couched in mandatory language which is unambiguous. It says without qualification that the contractor 'shall' give to the SO notice of intention to claim together with an estimate of loss within 30 days. In addition, it provides a severe penalty for failure to comply *ie*, the contractor will not be able to claim for the loss and expense. Thus, insofar as the necessity for compliance with the said condition is concerned, nothing could be clearer. In the premises, the said clause was a condition precedent which must be complied with unless there was evidence of waiver on the part of the employer. There was no such waiver. (para 28)

(2) Section 44.1 must not be read in isolation. It was linked to cl. 43.1 and therefore should be read together with it. Clauses 43 and 44 deal with delay and consequences thereof. Clause 43.1 deals with the grant of extension of time. Clause 44.1 allows a claim for loss as a consequence of the extension of time granted under cl. 43.1(c), (d), (e), (f) and (i). The claim for loss was because of the delay caused by four EOTs which fell under cl. 43.1. Clauses 43 and 44 were the only provisions in the contract that dealt with the manner of submitting a claim for loss arising from delay that was not caused by the contractor and for which an EOT had been granted by the SO. Any loss to the contractor that was caused

by delay had to be done within the ambit of cls. 43 and 44. There was no other provision in the contract that allowed for the claim of any other type of 'losses', for example, one that was 'within' reasonable contemplation. (paras 32 & 33)

(3) The words 'beyond that reasonably contemplated' in cl. 44.1 did not carry such significance as to permit one to conclude that there existed another type of loss *ie*, one that was 'within reasonable contemplation' which the HCJ said was not caught by the said clause. Such a reading would strain the meaning of the words in question. The words 'beyond that reasonably contemplated' was simply a general description of loss that was not expected at the outset of the project but ensued as a consequence of delay. Nonetheless, if the words 'beyond that reasonably contemplated' had the effect of addressing one type of loss that was subject to a condition precedent, other clauses would have been inserted into the contract to address loss 'within' reasonable contemplation. Clauses 43 and 44 were exhaustive on the subject of claiming for loss due to delay for which EOT had been granted. In the premises, given the clear breach of cl. 44.1, the decision of the High Court to grant partial judgment in the sum of RM2,988, 480.81 could not be sustained. (paras 34-36)

(4) The fact that the contractor had filed a series of appeals against the rejection of the claim could not detract from the finality of the certificate of final accounts. These series of appeals did not mean that the certificate lost its legal effect as a document that conclusively settled accounts between the parties after completion of the project. Otherwise, any dissatisfied contractor's persistent appeals would render any certificate of final accounts as not final. The certificate contained an acknowledgment that the contractor had no further claims upon signing the same. Therefore, with the exception of fraud or some other vitiating factor, it should be treated as a final rendering of the state of accounts between the parties. (para 41)

(5) The contractor was in an unenviable position as they were not satisfied with the rejection of their first appeal and intended to pursue the matter further. However, they could have made a reservation when they signed the certificate of final accounts. However, no such reservation was made and therefore the claim was barred given the terms of the certificate of final accounts which was signed by the contractor. (paras 51 & 52)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Education 4 Ayrshire Ltd v. South Ayrshire Council [2009] CSOH 146 ***(refd)***

Glen Water Ltd v. Northern Ireland Water Ltd [2017] NIQB 20 ***(refd)***

Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd [2014] 7 CLJ 1 FC ***(refd)***

Inai Bina Sdn Bhd v. Mohd Rizzal Shamat [2017] 1 LNS 608 HC ***(refd)***
Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor & Another Appeal [2016] 8 CLJ 804 CA ***(refd)***
Perbadanan Menteri Besar Kelantan v. Syarikat Perusahaan Majubina Sdn Bhd [2016] 1 LNS 505 CA ***(refd)***
Perbadanan Pembangunan Pulau Pinang v. Trikkon Construction Sdn Bhd [2012] 10 CLJ 111 CA ***(refd)***
Perusahaan Sinar Jaya Sdn Bhd v. Etiqa Insurance Bhd [2013] 8 MLJ 317 ***(refd)***
Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd [1992] 2 NZLR 473 ***(refd)***
TSR Bina Sdn Bhd v. Kontena Nasional Bhd [2011] 1 LNS 1766 CA ***(refd)***
WW Gear Construction Ltd v. McGee Group Ltd [2010] EWHC 1460 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 29, 71

For the appellants - Masriwani Mahmod & Habibah Haron; AG's Chambers
For the respondent - William Foo, Siaw Yoong Kei & Tan Wee Jiun; M/s Hiap Siong & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-21C-7-10-2018 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JCA:

[1] The instant appeal arises from the partially successful claim of a contractor in the High Court for loss and expense against the Government. The claim was made because of delay in the project that was not caused by the contractor. The contractor claimed the total sum of RM11,937,057.33 for loss and expense. The High Court granted judgment in the sum of RM2,988,480.81 with interest of 5% from date of statement of claim. The Government has appealed against this decision. The contractor did not appeal against the decision of the High Court to reject the balance of the claim.

Background Facts

[2] The appellants in this case are the Government of Malaysia and the Jabatan Kerja Raya (Public Works Department). They were the first and second defendants in the High Court. We shall collectively refer to them as the employer. They had appointed the respondent who was the plaintiff to construct a new ten-storey High Court building in Kuantan. We shall refer to the respondent as the contractor. The contract that the parties executed was the standard form PWD Contract 203A (Rev.2007). The original construction cost was RM157 million. The final cost was RM176 million. The project was completed successfully. However, the construction was

beset with delays. A total of four certificates of delay and extensions of time (EOTs) were granted to the contractor. It was common ground that the delay in the project was not caused by the contractor's fault or neglect.

[3] The reasons for the delay are summarised in the table set out in the judgment of the learned High Court Judge. They include inclement weather and various additions and changes made to the building project by the employer. The total extension of time that was granted under four EOTs was 560 days. Despite the delays, the project was successfully completed and Certificate of Practical Completion was issued on 17 July 2012.

[4] The EOTs were approved under cl. 43.1(b), (c), (e) and (i) of contract by the superintending officer (S.O.). Under cl. 44.1, the contractor is entitled to claim for loss and expense for the delay if the EOTs are approved under cl. 43.1(c), (d), (e), (f) and (i). Clause 44.1 reads as follows:

> 44.1 If at any time during the regular progress of the Works or any part thereof has been materially affected by reason of delays as stated under clause 43.1(c), (d), (e), (f) and (i) and the Contractor has incurred direct loss and/or expense beyond that reasonably contemplated and for which the Contractor would not be reimbursed by a payment made under any other provision in this Contract, then the Contractor shall within 30 days of the occurrence of such event or circumstances or instructions give notice in writing to the S.O. of his intention to claim for such direct loss or expense together with an estimate of the amount of such loss and/or expense, subject always to clause 44.2 hereof.

[5] The employer's defence to the claim for loss by the contractor was the failure to give written notice with an estimate of loss to the S.O. within 30 days of occurrence of any particular event stated in cl. 44.1. It was not disputed that the contractor did not give said notice within 30 days of the occurrence of the event in question. The notice was given only after the issuance of each of the four separate EOTs. However, the contractor complied with cl. 44.2 which is the second condition precedent. The said clause requires full particulars of all claims for direct loss or expense under cl. 44.1 to be submitted within 90 days of the Certificate of Practical Completion. Clause 44.2 reads as follows:

> 44.2 As soon as is practicable but not later than ninety (90) days after practical completion of the Works, the Contractor shall submit full particulars of all claims for direct loss or expense under Clause 44.1 together with all supporting documents, vouchers, explanations and calculations which may be necessary to enable the direct loss or expense to be ascertained by the S.O. The amount of such direct loss and expense ascertained by the S.O. shall be added to the Contract Sum.

[6] In respect of the requirement for compliance with cls. 44.1 and 44.2, cl. 44.3 provides a harsh penalty for failure which is as follows:

44.3 If the Contractor fails to comply with Clauses 44.1 and 44.2, he shall not be entitled to such claim and the Government shall be discharged from all liability in connection with the claim.

[7] The failure of the contractor to comply with cl. 44.1 was the reason that the claim for loss and expense was denied by the employer.

Decision Of The High Court

[8] The learned High Court Judge addressed the following issues in his judgment:

(i) Whether the condition of 30 days' written notice under cl. 44.1 is a condition precedent?

(ii) Whether the notice in cl. 44.1 had been waived by the conduct of the employer?

(iii) Whether the contractor was barred from claiming for loss and expense for having signed on the Certificate of Final Accounts?

(iv) Whether the condition precedent in cl. 44.1 is caught by s. 29 of the Contracts Act 1950?

(v) Whether the condition precedent is unconscionable or otherwise against public policy?

(vi) Whether the condition precedent would offend the principle of unjust enrichment?

[9] In respect of the question whether the requirement for the contractor to give notice within 30 days of occurrence of an event that gives rise to direct loss and/or expense together with an estimate is a condition precedent or otherwise, the learned High Court Judge answered the question in the affirmative. His Lordship was mindful that the second notice period in cl. 44.2, *ie*, the requirement to submit full particulars within 90 days of the issuance of the Certificate of Practical Completion was met. However, His Lordship, after referring to eminent authorities, held that the condition in cl. 44.1 is a condition precedent that must be satisfied.

[10] In respect of the issue of waiver, the learned High Court Judge held that there was no waiver of the condition precedent in cl. 44.1 on account of the letters that the contractor sent to the employer after the EOTs were given. Since, the contractor did not give any estimate of the loss beyond stating that there will be cost implication, the learned High Court Judge held that there was no waiver for loss and expense.

[11] In respect of the question whether the contractor can claim for loss and expense after having signed the Certificate of Final Accounts, the learned High Court Judge answered it in the affirmative. His Lordship found that after the said certificate was signed, the employer never raised the argument

that no claims could be entertained. Furthermore, when the final accounts were being prepared, the employer had knowledge that the appeal against the rejection of the claim for loss and expense were under consideration and they also entertained further appeals after the certificate was issued.

[12] In respect of the question whether the condition precedent in cl. 44.1 is caught by s. 29 of the Contracts Act 1950, learned High Court Judge answered it in the negative. His Lordship, after citing eminent authorities which made a distinction between the assertion of a right under a contractual provision and the enforcement of that right in a court of law, held that cl. 44.1 was not caught by s. 29.

[13] In respect of the question whether the condition precedent is unconscionable or otherwise against public policy, the learned High Court Judge answered it in the negative. His Lordship held that there was nothing unconscionable about the clause in question. The contractor had bid for a RM157 million Government project. They could have refused to execute the standard form contract if they were uncomfortable with it. The condition precedent could have been complied with proper contract management in respect of time-based notices.

[14] Finally, in respect of the question whether the condition precedent offended the principle of unjust enrichment, learned High Court Judge answered the question in the negative. His Lordship held that there was nothing improper or unconscionable about the condition precedent in question which required notice of intention to claim an estimate of the loss and expense to be given within the stipulated period. For this reason also, the contractor cannot seek resort to a quantum meruit claim under s. 71 of the Contracts Act 1950.

[15] Thus, save for the issue whether the contractor is barred from claiming for loss and expense after having signed the Certificate of Final Accounts, the learned High Court Judge determined all the other abovementioned issues in favour of the employer. Nonetheless, His Lordship granted partial judgment in the sum of RM2,988,480.81 out of the total claim of RM11,937,057.33. The reasons for this decision may be summed up as follows.

[16] Clause 44.1 refers to loss incurred "beyond that reasonably contemplated" and for which there is no reimbursement under any other provision. The High Court Judge attached significance to the words "beyond" in "beyond that reasonably contemplated". His Lordship considered those words in contradistinction to "within" reasonable contemplation and distinguished the latter. His Lordship held that the rationale for giving notice in writing within 30 days in cl. 44.1 was to assist the employer with respect to budgeting so that it would not escalate out of control. It followed that the notice referred to in cl. 44.1 only applied to loss that is "beyond" reasonable contemplation and not to loss that is "within" reasonable contemplation.

[17] The claim of the contractor consisted of Preliminaries of RM5,205,817.16, Contract Preliminaries of RM423,248 and Head Office Costs of RM6,307,991.58. The details of losses were carefully set out and tabulated in the judgment of the High Court. We do not propose to reproduce them here. His Lordship ruled that the items of loss that are of a recurring nature falls within the meaning of "reasonably contemplated". He allowed losses of a recurring nature after prorating them to take into account the extended EOT period. Examples of recurring expenses were given in para. [21] of High Court judgment which as follows:

> [21] Surely it cannot be that the plaintiff contractor here is required to do extra works arising out of, for example, further variation works instructed by the S.O. and would therefore incur more costs which are recurring like that of office support staff, rental of premises, equipment and machinery, power and water supply, insurance coverage and extension of performance bond which had already been identified in the Preliminaries, and yet not being able to claim for such "loss and expense".

[18] Employing the abovementioned method, learned High Court Judge granted judgment in the sum of RM2,988,480.81 which he said are loss and expense "within" reasonable contemplation and therefore are not caught by the notice period in cl. 44.1. The balance of the claim of the contractor was not allowed as they represented loss and expense "beyond" reasonable contemplation and for which notice in cl. 44.1 is a condition precedent.

Issues In This Appeal

[19] The issues argued by the parties before us are:

(i) effect of failure to comply with the 30 days' time period in cl. 44.1;

(ii) whether the contractor can claim for "loss and expense" after signing the Certificate of Final Accounts.

[20] Counsel for contractor addressed a third issue in the written submission, *ie*, whether the "Emden Formula" used by the learned High Court Judge to calculate loss and expense pursuant to extension of time is applicable in this case. It was raised in the memorandum of appeal but was not pursued by the Senior Federal Counsel (SFC) who represented the employer in the written submission or during oral argument. In the premises, we shall not deal with it.

Effect Of Failure To Comply With The 30 Days' Notice

[21] It must be recalled that the High Court found that the requirement to give written notice of intention to claim with the estimate of loss within 30 days in cl. 44.1 is a condition precedent. His Lordship reached this conclusion after carefully examining the language employed in cl. 44.1 and eminent authorities on the subject. In order to determine whether a term of

a contract is a condition precedent, the learned High Court Judge referred to the test given in the New Zealand's case of *Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473 which is as follows:

> that he who seeks to rely upon such a clause to show that there was a condition precedent before liability to pay arose at all should show that the clauses relied upon contain no ambiguity...I believe that unless the condition precedent is spelled out in clear and precise terms and accepted by both parties, the clauses ... do no more than identify the time at which certain things are required to be done ...

[22] The above-mentioned case was also cited by our Federal Court in *Globe Engineering Sdn Bhd v. Bina Jati Sdn Bhd* [2014] 7 CLJ 1. The learned High Court Judge also cited the English case of *Glen Water Ltd v. Northern Ireland Water Ltd* [2017] NIQB 20, where the court quoted the following passage from an earlier case (*Education 4 Ayrshire Ltd v. South Ayrshire Council* [2009] CSOH 146):

> Where parties have laid down in clear terms what has to be done by one of them if he is to claim certain relief, the court should be slow to seek to relieve that party from the consequence of failure.

[23] The third English case referred to by the learned High Court Judge was the well-known case of *WW Gear Construction Ltd v. McGee Group Ltd* [2010] EWHC 1460. This case established that the courts would enforce conditions precedents, however harsh they may be to the contractor, if they are drafted in clear and unambiguous language. It was held in that case that without compliance with the condition precedent, the process to ascertain loss and expense cannot be triggered.

[24] The learned High Court Judge also referred to two Malaysian Court of Appeal cases on this point. In *Perbadanan Menteri Besar Kelantan v. Syarikat Perusahaan Majubina Sdn Bhd* [2012] 10 CLJ 111; [2016] 1 LNS 505, the contract in question was also a standard form Government contract. The Court of Appeal speaking through Mary Lim JCA (now FCJ) held that the one-month period in the said clause runs from the date of occurrence of event and not from the date of the EOT and the failure to comply freed the Government from considering the claim for loss and expense. The second Court of Appeal case considered by the learned High Court Judge was the case *Perbadanan Pembangunan Pulau Pinang v. Trikkon Construction Sdn Bhd* [2012] 2 MLJ 28. The construction dispute in that case was arbitrated. The issue that arose was whether the claim in question was raised in accordance with a term of the contract, *ie*, within reasonable time of occurrence to allow the architect to ascertain the amount involved. The contractor only "reserved" the right to claim the loss each time variation was ordered. The Court of Appeal held that the act of reserving the right to claim loss did not entitle the contractor to maintain the claim. The Court of Appeal said as follows in the following passage which we find to be relevant:

> [9] With respect, we are unable to agree with the two stage approach adopted by the Arbitrator. In our view, on a proper construction of cl. 11(6) of the contract, there is an obligation on the respondent to lodge a formal application containing his claim with the Architect as soon as it becomes apparent to the respondent that the particular variation ordered by the architect for the project has caused loss to the contractor. We concede that the contractor may not be able to produce all of the supporting documents when making the application and should therefore be allowed to produce further documents at a subsequent stage. However, in our opinion, this concession does not detract from the fact that under cl. 11(6) of the contract the lodging of the claim by way of application to the architect for the project is a pre-requisite to the pursuit of a claim under this clause. The respondent's act of merely reserving its right to make such a claim at such time as it unilaterally deemed fit clearly does not meet this pre-requisite.

[25] Learned counsel for the contractor did not seriously argue against the finding of the High Court that stipulation in cl. 44.1 is a condition precedent. However, he supported the finding of the learned High Court Judge that it only applied to loss and expense "beyond" reasonable contemplation. On the other hand, the learned SFC did not trouble to argue the point about the dichotomy between loss "within" and "beyond" reasonable contemplation in her written submission.

[26] Nonetheless, she took the point that the claim for all losses in the standard form contract that was used in this case comes under cl. 44.1. She argued, based on the same eminent authorities cited by the learned High Court Judge, that it is settled that such a clause is a condition precedent and that the failure to give notice within the stipulated period together with an estimate of loss is fatal.

[27] The learned SFC pointed out that a total of 560 days were extended by the four EOTs. She said that it was undisputed during the trial that the deadline of 30 days had passed for each one of the EOTs by the time the contractor furnished notice of intention claim for loss and expense. The witnesses for the contractor (SP1, SP2 and SP3) were aware of the condition in cl. 44.1 and agreed that they failed to comply with it. She echoed the view of the learned High Court Judge that the condition precedent may be rigid but its purpose is to enable the employer to assess loss at the point of occurrence of the event in question for budgeting purposes.

[28] We note that the words "condition precedent" does not appear in cl. 44.1. Such words appear in similar provisions in other contracts such as the standard PAM contract. But from the authorities that we cited earlier, it is clear that whether a term is an essential condition precedent is very much dependent on the language and its relation to the contract. Clause 44.1, as noted by the learned High Court Judge is couched in mandatory language

which is unambiguous. It says without qualification that the contractor "shall" give to the S.O. notice of intention to claim together with an estimate of loss within 30 days. In addition, it provides a severe penalty for failure to comply, *ie*, the contractor will not be able to claim for the loss and expense. Thus, insofar as the necessity for compliance with the said condition is concerned, nothing could be clearer. In the premises, we would affirm the finding of the learned High Court Judge that the said clause is a condition precedent which must be complied with unless there is evidence of waiver on the part of the employer. As we noted earlier, the learned High Court Judge found there is no waiver. We shall now consider whether the learned High Court Judge correctly allowed part of the claim on the ground that it was not caught by cl. 44.1.

"Within" And "Beyond" Reasonable Contemplation Issue

[29] The loss that is incurred by the contractor as a result of delay in cl. 44.1 is referred to as "loss and/or expense beyond reasonably contemplated". As we noted earlier, the learned High Court Judge found that recurring expenses in the preliminaries were expenses "within reasonable contemplation" and therefore are not caught by cl. 44.1. His Lordship's reasoning is found in the following paragraphs of the judgment:

> [19] Both common and commercial sense as well as business reality would combine to allow a claim reasonably contemplated for it is a claim for "loss and expense" that naturally and consequently arises from factors not attributable to any fault or default of the plaintiff contractor such as a change of design and drawing, variation instructed by the S.O., suspension of works by the employer and delay on the part of Nominated Subcontractors to perform their works.
>
> [20] The rationale for service of Notice on the S.O. is not there when the S.O. being professionally qualified in the building or infrastructure construction whether as an architect or engineer, would not be so dull or dense to know that if more time is naturally required arising out of fresh variation works instructions from the S.O. then as the economist would tell us - time is money and more time would mean more money is required.
>
> [21] Surely it cannot be that the plaintiff contractor here is required to do extra works arising out of, for example, further variation works instructed by the S.O. and would therefore incur more costs which are recurring like that of office support staff, rental of premises, equipment and machinery, power and water supply, insurance coverage and extension of performance bond which had already been identified in the Preliminaries, and yet not being able to claim for such "loss and expense".
>
> [22] This Court would thus allow the claim for the items in the Preliminaries that are recurring whereby it can be said that these are reasonably contemplated as being incurred with the plaintiff being required to do additional works in the form of variation works through no fault of the plaintiff.

[30] Thus, the learned High Court Judge was of the view that recurring items in the preliminaries are losses that are "within" reasonable contemplation. As the delay was not caused by the contractor, it follows that they should be compensated.

[31] We respectfully disagree with the view of the learned High Court Judge that loss and expense that are claimable under cl. 44.1 can be subjected to a dichotomy between one that is "beyond" reasonable contemplation and one that is "within" reasonable contemplation. We find that nothing in the language of the cl. 44.1 or in the standard form contract in question supports such a reading. Our reasons are as follows.

[32] First of all, cl. 44.1 must not be read in isolation. It is linked to cl. 43.1 and therefore should be read together with it. Clause 43.1, in part, reads as follows:

> 43.0 Delay And Extension Of Time
>
> 43.1 Upon if becoming reasonably apparent that the progress of the Works is delayed, the Contractor shall forthwith give written notice to the officer named in Appendix as to the causes of delay and relevant information with supporting documents enabling the said officer to form an opinion as to the cause and calculation of the length of delay. If the opinion of the said officer named in Appendix the completion of the Works is likely to be delayed or has been delayed beyond the Date for Completion stated in Appendix or beyond any extended Date for Completion previously fixed under this Clause due to any or more of the following events:

[33] Clauses 43 and 44 deal with delay and consequences thereof. Clause 43.1 deals with the grant of extension of time. It permits the S.O. to grant extension of time to the contractor. Clause 44.1 allows a claim for loss as a consequence of the extension of time granted under cl. 43.1(c), (d), (e), (f) and (i). The claim for loss in the instant case is because of the delay caused by four EOTs which fall under cl. 43.1 as noted by the learned High Court Judge. It is plain to us that cls. 43 and 44 are the only provisions in the contract that deal with the manner of submitting a claim for loss arising from delay that is not caused by the contractor and for which an EOT has been granted by the S.O. In the premises, in our view, any loss to the contractor that is caused by delay has to be done within the ambit of cls. 43 and 44. We note that there is no other provision in the contract that allows for the claim of any other type of "loss", for example, one that is "within" reasonable contemplation.

[34] We also do not think that the words "beyond that reasonably contemplated" in cl. 44.1 carries such significance as to permit one to conclude that there exists another type of loss, *ie*, one that is "within reasonable contemplation" which the learned High Court Judge said is not caught by the said clause. Such a reading would strain the meaning of the

words in question. We are of the opinion that the words "beyond that reasonably contemplated" is simply a general description of loss that was not expected at the outset of the project but ensued as a consequence of delay.

[35] We have read the authorities cited by counsel for the contractor who canvassed the argument that to interpret the clause in question, the contract must be read as a whole, that words must be given their natural and ordinary meaning, that an objective test must be used and that the facts surrounding the transaction must be considered. Counsel for the contractor also submitted that every word used must be considered as they are not used for a decorative purpose. We do not disagree with the approach to interpretation that is suggested in those cases. Nonetheless, for reasons given earlier, we are of the view that if the words "beyond that reasonably contemplated" has the effect of addressing one type of loss that is subject to a condition precedent, other clauses would have been inserted into the contract to address loss "within" reasonable contemplation. In our respectful view, cls. 43 and 44 are exhaustive on the subject of claiming for loss due to delay for which EOT has been granted.

[36] In the premises, we would agree with the learned SFC that given the clear breach of cl. 44.1, the decision of the High Court to grant partial judgment in the sum of RM2,988,480.81 cannot be sustained.

Certificate Of Final Accounts

[37] Learned SFC also argued that the claim should have been dismissed on the ground that the contractor admitted that no further payment was due in the Certificate of Final Accounts. The admission in the certificate reads as follows in the original language:

> C. Pengakuan Persetujuan Kontraktor Ke Atas Perakuan Akaun Dan Bayaran Muktamad
>
> (Kontraktor hendaklah menurunkan tandatangan dan mengembalikan dokumen ini dalam tempoh tiga puluh (30) hari dari tarikh penerimaan jika Perakuan Akaun Bayaran Muktamad ini dipersetujui. Jika Kontraktor gagal berbuat demikian, pejabat ini akan meneruskan bayaran muktamad).
>
> Saya/kami yang bertandatangan di bawah ini mengaku penerimaan Perakuan Akaun dan Bayaran Muktamad di atas dan setelah meneliti butir-butir terkandung di atas dan setelah meneliti butir-butir terkandung di dalamnya, bersetuju dengan Bayaran Muktamad Diperakukan dan mengaku saya/kami tidak ada tuntutan lanjut di bawah kontrak ini.

[38] The case of *TSR Bina Sdn Bhd v. Kontena Nasional Bhd* [2011] 1 LNS 1766; [2011] MLJU 1364 on the consequence of signing a final certificate was cited by the learned SFC. In that case, the summary judgment application was made on the basis of the amount certified in the Final

Certificate of Payment. The Court of Appeal held that the certificate was conclusive and binding in the absence of fraud and that it also an admission of the amount payable.

[39] In the instant case, by the time the Certificate of Final Accounts was prepared on 16 October 2014, the contractor had issued the notice of intention to claim for loss and expense. The four notices in respect of the four EOTs were issued between 23 August 2010 and 16 August 2012. The claim was rejected by the employer on 22 October 2012 for non-compliance with the condition precedent in cl. 44.1. The rejection letter was signed by the Pahang State Director of JKR. Thus, the contractor had knowledge of the rejection when they signed off on the Certificate of Final Accounts on 16 October 2014. The learned High Court Judge held that the Certificate of Final Accounts was not a bar to the instant claim because the employer "was entertaining appeals" from the contractor after 16 October 2014. The contractor first appealed against the rejection of their notices of intention to claim for loss and expense on 9 January 2013. Several other appeals followed between 2014 and 2017. All were rejected. The final rejection letter was issued on 17 March 2017 by the Coordination Contract Panel Committee of the Director General of JKR.

[40] The question that arises is whether the continuous appeals of the contractor prevented the Certificate of Final Accounts from barring further claims. The learned High Court Judge said that the contractor was in an unenviable position in that if they did not sign the certification, they would not receive payment and their sub-contractors would not be paid and that to sign would mean that their appeal would be deemed withdrawn or abandoned.

[41] In our view, the fact that the contractor had filed a series of appeals against the rejection of the claim cannot detract from the finality of the Certificate of Final Accounts. The certificate was issued about two years after the last notice of intention to claim was made. The first appeal was rejected about one year and nine months before the certificate was issued. But as we said earlier, the contractor launched a number of appeals despite rejection of previous appeals. To our mind, these series of appeals do not mean that the certificate losses its legal effect as a document that conclusively settles accounts between the parties after completion of the project. Otherwise, any dissatisfied contractor's persistent appeals will render any Certificate of Final Accounts as not final. The certificate contains an acknowledgment that the contractor has no further claims upon signing the same. We reproduced it earlier in the original language. The certificate means what it says. Therefore, with the exception of fraud or some other vitiating factor, it should be treated as a final rendering of the state of accounts between the parties.

[42] It is true as pointed out by the learned High Court Judge that the employer did not mention that the claim is barred because of the said certificate in the letters that passed between them prior to being sued. But there is nothing in the conduct of the employer to suggest a waiver. For waiver to operate, there must be some evidence that the employer had relinquished its right to treat the certificate as final. We reproduce below some passages on the meaning of waiver from *Halsbury's Law of England* (4th edn, Reissue-Volume 9(1) at para. 1025) and *Chitty on Contract* (13th edn). These passages are gratefully extracted from the judgment of Nallini Pathmanathan J (now FCJ) in the case of *Perusahaan Sinar Jaya Sdn Bhd v. Etiqa Insurance Bhd* [2013] 8 MLJ 317. The passage from *Halsbury* is as follows:

> "Waiver" is a vague term used in many senses. It is sometimes used in the sense of an election ('waiver' by election') as where a person decides between two mutually exclusive rights … 'Waiver' is also used to describe the situation where a party prevents performance or announce that he will refuse performance. In the law of contract, 'wavier' sometimes refers to a variation of contract supported by consideration; or it may refer to the act of an innocent contracting party to affirm the contract after serious breach; or it may describe the election of the innocent party to abandon all rights in respect of a breach of contract. However, in contract it is most commonly used to describe the process whereby one party unequivocally, but without consideration, grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived. A 'waiver' by estoppel or forbearance in this sense is to be distinguished from a variation; a variation is supported by consideration and cannot be retracted unilaterally; but a 'waiver' or forbearance is without consideration and may *prima facie* be retracted unilaterally.

[43] In *Chitty on Contract* (13th edn), waiver is defined as follows:

> Waiver or forbearance. Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. Waiver (in the sense of 'waiver by estoppel' rather than 'waiver by election) may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.
>
> Effect on party forbearing. The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered …

[44] In the instant case, all that happened was that the contractor had appealed against the rejection of the further claim time and again. And the employer had stated upon receipt of each of the appeals that they will consider it. There was nothing remarkable about the fact that such a reply had been given, especially since JKR is a Government department. But it is significant to note that at no time a concession or forbearance was granted by the employer to the effect that they would refrain from treating the certificate as final on account of the appeals. Thus, the indulgence granted by the employer to merely consider the appeals cannot be equated with a waiver to treat the certificate as not final. In the premises, we cannot agree with the learned High Court Judge that the appeals had effectively prevented the certificate from barring further claims.

[45] For the same reason, we find the authorities on waiver and estoppel cited by learned counsel for the contractor to be inapplicable on the facts of this case.

[46] Counsel for the contractor submitted that the approach taken in the case of *Inai Bina Sdn Bhd v. Mohd Rizzal Shamat* [2017] 1 LNS 608 is relevant. In that case, a claim for further payment was allowed despite the fact a final payment certificate was signed. In that case, the plaintiff had claimed for payment from the defendant who was their joint venture partner for work done. The defendant was the sub-contractor of the main contractor. At the material time, RM2,037,459.23 was claimed by the plaintiff as due from the defendant. In the final payment certificate, it was stated that RM300,000 was due. But this certificate was not signed by the plaintiff. It was signed by the defendant. The defendant agreed not to make further claims. The plaintiff had no knowledge about it. The court found that the plaintiff never agreed to accept the said sum. It was done unilaterally by the defendant. Thus, this case is not on point. In the instant case, the contractor had signed the certificate with full knowledge that it would bar them from making further claims. The contractor was aware also that the earlier appeal to the employer had been rejected.

[47] The other two cases cited by counsel for the contractor were *Kelana Megah Development Sdn Bhd v. Kerajaan Negeri Johor & Another Appeal* [2016] 8 CLJ 804 and *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283. These cases were cited to support the contention of the contractor that the employer in the instant case had "approbated and reprobated" about the appeal in question and that they are "estopped" from doing so. However, the facts in the said two cases which gave rise to the application of the principle that one should not "approbate and reprobate" and the doctrine of estoppel have no relation whatsoever to the facts of the instant case.

[48] *Kelana Megah Development Sdn Bhd v. Kerajaan Johor & Another Appeal* (*supra*) was land acquisition case. The appellant not only challenged the compensation award in a land reference hearing but also simultaneously challenged the acquisition in a civil suit. The Court of Appeal said that the appellant was "approbating and reprobating". In the instant case, the reply of the employer that they would consider the appeal cannot amount to "approbating and reprobating" as no decision in favour of the contractor was made and no indication that such a decision would be made was given.

[49] In the oft-quoted Federal Court case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* (*supra*), the dispute which called for the application of the doctrine of estoppel arose against the backdrop of a factoring arrangement. The supplier of goods forwarded the goods in question to the appellant (buyer) with an invoice which stated that any objections must be reported to the respondent (factoring house) within 14 days. Under the factoring agreement the buyer was supposed to pay the respondent at a later date for the purchase of the said goods. The buyer only complained several months later that the amount in the disputed invoices should have been set off against some other goods returned to the supplier earlier. By then, the respondent who had been influenced by the conduct of the buyer had made payment to the supplier pursuant to the factoring agreement. It was held that the doctrine of estoppel would operate against the appellant.

[50] In the instant case, as we noted earlier, the appeal of the contractor had already been dismissed once by the time they signed the Certificate of Final Accounts. No doubt, further appeals were mounted. But the High Court did not make a finding that the employer had influenced or induced the contractor to sign the certificate by saying that the further appeal would be successful. We find no evidence on the record to come to such a conclusion either.

[51] For sake of completeness, it must be said that we also acknowledge, as did the learned High Court Judge, that the contractor was in an unenviable position as they were not satisfied with the rejection of their first appeal and intended to pursue the matter further. However, they could have made a reservation when they signed the Certificate of Final Accounts. This option was in fact acknowledged by the learned High Court Judge in the following paragraph of his judgment:

> [94] The grim reality of the above situation is such that it is more reasonable for the plaintiff to have signed the Certificate of Final Accounts subject to the right given to it to pursue its appeal on the "loss and expense" with the defendant.

[52] However, no such reservation was made and therefore the claim was barred given the terms of the Certificate of Final Accounts which was signed by the contractor.

Conclusion

[53] For all the above reasons, we shall allow the appeal and set aside the judgment of the High Court. We grant costs in the sum of RM50,000 here and below to the employer.